

MONTANA LEGISLATIVE HISTORY

Chapter 416 19 81

Bill H 703 S _____

Original bill & history ☒ C

H. Committee on Judiciary

Hearing Date(s) Feb 16 ☒ C

Feb 20 ☒ C

_____ ☐ C

_____ ☐ C

Date Out Feb 20 ☒ C

S. Committee on Judiciary

Hearing Date(s) Mar 18 ☒ C

Mar 24 ☒ C

Mar 25 ☒ C

_____ ☐ C

Mar 25 ☒ C

Did this bill originate in an interim committee? ☐ Yes ☐ No

Committee _____

Report _____

HOUSE BILL NO. 703

INTRODUCED BY DUSSAULT, MAZUREK

IN THE HOUSE

February 10, 1981	Introduced and referred to Committee on Judiciary.
February 20, 1981	Committee recommend bill do pass as amended. Report adopted.
February 21, 1981	Bill and printed and placed on members' desks.
February 23, 1981	Second reading, do pass.
February 24, 1981	Correctly engrossed.
February 25, 1981	Third reading, passed. Ayes, 79; Noes, 13. Transmitted to Senate.

IN THE SENATE

March 3, 1981	Introduced and referred to Committee on Judiciary.
March 26, 1981	Committee recommend bill be concurred in as amended. Report adopted.
March 28, 1981	Motion pass consideration.
March 30, 1981	Motion pass consideration.
March 31, 1981	Second reading, concurred in as amended.
	On motion rules suspended. Bill placed on calendar for third reading this day and allowed to be transmitted on 71st legislative day. Motion adopted.
	Third reading, concurred in as amended. Ayes, 45; Noes, 3.

IN THE HOUSE

April 1, 1981

Returned from Senate with amendments.

April 9, 1981

Second reading, amendments concurred in.

On motion rules suspended and bill placed on third reading this day.

Third reading, amendments concurred in. Ayes, 87; Noes, 3. Sent to enrolling.

Reported correctly enrolled.

HOUSE BILL NO. 703

INTRODUCED BY

Shirley M. Morgan

A BILL FOR AN ACT ENTITLED: "AN ACT TO ESTABLISH A PREFERENCE FOR JOINT CUSTODY AWARDS UPON DISSOLUTION OF MARRIAGE; ESTABLISHING AN ORDER OF PREFERENCE ACCORDING TO THE BEST INTERESTS OF THE CHILD; AND ALLOWING THE NONCUSTODIAL PARENT ACCESS TO RECORDS."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Declaration of legislative intent -- joint custody. (1) The legislature of the state of Montana finds and declares that it is the public policy of this state to assure minor children frequent and continuing contact with both parents after the parents have separated or dissolved their marriage and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy. The legislature believes that the district courts of the state of Montana have the authority to award joint custody to any interested party if the court finds joint custody in the best interests of the children in the case then before the court. The intent of [this act] is to establish preferences and certain guidelines for resolution of custody disputes.

Section 2. Award of joint or separate custody. In

custody disputes involving both parents of a minor child, custody shall be awarded in the following order of preference according to the best interests of the child as set out in 40-4-212:

(1) to both parents jointly pursuant to [section 3]. The court, in its discretion, may require the submission to the court of a plan for the implementation of the joint custody order; or

(2) to either parent. In making an award to either parent, the court shall consider, along with the factors set out in 40-4-212, which parent is more likely to allow the child frequent and continuing contact with the noncustodial parent and may not prefer a parent as custodian because of the parent's sex. The court, in its discretion, may require the submission to the court of a plan for the implementation of the custody order.

Section 3. Presumption in favor of joint custody -- modification -- consultation with professionals. (1) Upon application of either parent or both parents for joint custody, there is a presumption, affecting the burden of proof, that joint custody is in the best interests of a minor child. If the court declines to enter an order awarding joint custody the court shall state in its decision the reasons for denial of an award of joint custody.

(2) For the purposes of this section, "joint custody"

1 means an order awarding custody of the minor child to both
 2 parents and providing that the residency of the child shall
 3 be shared by the parents in such a way as to assure the
 4 child frequent and continuing (but not necessarily equal)
 5 contact with both parents.

6 (3) Any order for joint custody may be modified
 7 pursuant to 40-4-219 to terminate the joint custody. If
 8 modification is granted and either parent opposes the
 9 modification, the court shall state in its decision the
 10 reasons for modification.

11 (4) Any order for the custody of a minor child entered
 12 by a court in this state or any other state may, subject to
 13 appropriate jurisdictional requirements, be modified at any
 14 time to an order of joint custody in accordance with the
 15 provisions of 40-4-212 and [this act].

16 (5) The court may, at any time, direct the parties to
 17 consult with appropriate professionals for the purpose of
 18 assisting the parties to formulate a plan for implementation
 19 of the custody order or to resolve any controversy that has
 20 arisen in the implementation of a plan for custody.

21 Section 4. Access to records by noncustodial parent.
 22 Notwithstanding any other provision of law, access to
 23 records and information pertaining to a minor child,
 24 including but not limited to medical, dental, law
 25 enforcement, and school records, may not be denied to a

1 parent because such parent is not the child's custodial
 2 parent.

3 Section 5. Codification instruction. Sections 1
 4 through 4 are intended to be codified as an integral part of
 5 Title 40, chapter 4, part 2.

-End-

JUDICIARY

COMMITTEE

47th Legislature

Bill No.	Subject Matter	Date In	Sponsor	Hearing Date	Committee Action	Date Out
676	To eliminate earmarked funding for the crime victims compensation program, thus requiring that funding for the program be by leg. approval.	2/7/81	Harper	2/12/81	Do Not Pass 2/19/81	2/19/81
678	Revise the provisions relating to city judges for towns, etc.	2/7/81	Burnett	2/10/81	Do Pass as Amended 2/13/81	2/13/81
689	Providing for the compulsion of incriminating testimony of witnesses before courts, state agencies, and leg. and regulations.	2/9/81	Keyser	2/17/81	Do Pass 2/20/81	2/20/81
690	Revise and clarify chapters 21 and 22 of Title 46, MCA, pertaining to postconviction and habeas corpus relief.	2/9/81	Keyser	2/17/81	Do Pass 2/20/81	2/20/81
698	To provide that a defendant who is provided with court-appointed counsel may be required upon conviction to repay the costs of counsel.	2/10/81	Meyer	2/16/81	Do Pass as Amended 2/20/81	2/20/81
703	To establish a preference for joint custody awards upon dissolution of marriage.	2/10/81	DeSault	2/16/81	Do Pass as Amended 2/20/81	2/20/81

MINUTES OF THE MEETING OF THE JUDICIARY COMMITTEE
February 16, 1981

The meeting of the House Judiciary Committee was called to order by Chairman Kerry Keyser at 8:00 a.m. in Room 437 of the Capitol. All members were present except Rep. Conn and Rep. Daily, who were excused. Rep. Teague was absent. Jim Lear, Legislative Council, was present.

HOUSE BILL 703 REP. DUSSAULT, chief sponsor, stated this bill is to establish a preference for joint custody awards upon dissolution of marriage. This would insure the minor child flexibility and constant contact with both parents.

JOAN UDA stated about 100 years ago when a marriage was dissolved the child went with the father. That changed and the child went with the mother particularly if the child was young in years. We have reached an age where the dissolution of a marriage is quite common. Joint custody is something that will happen only if both parents ask for it. It severs all rights and obligations except to see the child is supported. The only other way is when abuse and neglect are involved.

The bill makes clear that once you are a parent you are always a parent.

VINCE MATULA supports this bill. EXHIBIT 1.

MARGARET STEWART has worked with child welfare in the SRS. One of the most damaging things is to separate a child from the parent. The child loses out in life. It has been established in a study in California that joint custody in which each parent has important decisions in the life of the child, the child is better off.

B. MOLONEUX stated about 40% of all marriages end in divorce. That statistic will increase to 55-60% in Montana. The impact of divorce places the child in a high risk area. It is not the divorce that hurts the children, it is the conditions surrounding the divorce that hurts the child. If the situation is absent of complications, anger and financial matters the child usually is not hurt drastically.

ALAN D. NICHOLSON read from EXHIBIT 2.

CAROL MITCHELL gave out EXHIBITS 3 and 4. MITCHELL stated in representing a client seeking a divorce the most traumatic thing is the decision of custody of the children. There have been over 100,000 kidnappings of children by the parent who does not have custody. Many times a parent won't visit the child because it is too painful, not because it is a financial burden.

There were no further proponents.

There were no opponents.

In closing, REP. DUSSAULT stated the data is clear that joint custody benefits the children as it provides security. It is in the best interest of the parents as it protects them both. It makes presumptions in the courts.

REP. HANNAH asked if this bill would make it easier to obtain a divorce. MITCHELL said no. Usually the wife comes in and files for the divorce knowing she will get to keep the children. If the dad becomes serious and feels it is not fair then the contest of custody begins. Many times the father does not contest because his friends tell him he probably will not get the kids. MITCHELL stated she has to prove to the court that this is an exceptional father.

REP. KEEDY asked what makes MITCHELL think the judges will follow this law. MITCHELL replied it draws it to their attention. This way they will not have to make a choice between which parent is best.

REP. EUDAILY asked if the schools should be notified of joint custody. Many times a parent who does not have custody will come to the school to take the child with them or to look at school records. The sponsor replied section 4 allows those parents access to the records. UDA stated often times there is a question to who has rights to the records. This would open it up.

REP. HANNAH questioned remarriage. REP. DUSSAULT stated custody would remain with the original set of parents. Only by a court order would that change. UDA stated usually when she represents the interest of the youth tests are performed on him. He is evaluated. She calls the attorneys of both parents and makes suggestions concerning the welfare of the child. Usually they agree with her decision.

REP. BENNETT asked if a parent can be forced to attend a meeting with counselors, ministers, etc. UDA stated the law allows that now to determine various things.

HOUSE BILL 698 REP. MEYER stated this bill is to provide that a defendant who is provided with court-appointed counsel may be required upon conviction to repay the costs of counsel. A person must submit under oath a financial statement to obtain a lawyer appointed by the court. Section 3 states if the person makes a false statement he may be charged with false swearing.

REP. MEYER felt section 4 was the most important part of the bill. It states the court may sentence a defendant to pay the costs.

Vincent P. Matule
429 Raymond Street
Helena, Montana 59601

Mr. Chairman and Members of this Committee:

My name is Vince Matule and I am speaking in support of House Bill #703. Fortunately my wife and I share the joint custody of our children at this time by virtue of a successful marriage. I believe if any differences occur in the future which may make it impossible for us to live together, that these differences should not interfere with our ability to parent our children. I believe that my wife and I share this right and I believe that we also share this responsibility. I also believe it is the right of our children.

This legislature has repeatedly addressed itself to a changing mood in our country which more firmly affixes responsibility to parents. The most recent example of such legislation is the tentative approval given to the bill calling for the publication of the names of juvenile offenders. The Department of Revenue has increased a hundredfold its efforts to see that the absent parent of children are held financially responsible for their children. Such added responsibility must carry with it an increase in the rights of these parents for in a democracy such as ours, rights and responsibilities go hand in hand.

It is inevitable that our legislature begin to deal with the problems surrounding the growing number of divorces. Laws pertaining to divorce must be re-examined and kept abreast of changing mores in our society. This bill addressed one of the more complex and painful results of marriage breakdown. Essentially it gives to the court one more option to be included in the decision making process affecting the children of divorce. It attempts to maintain the involvement of both parents in the rearing of the children. Such involvement has been clearly demonstrated to be in the best interests of the children.

For too long, this responsibility has rested unfairly on the mother. Due to her nurturing capability, she was expected by the court to always be the primary caretaker of the children. She was given the full parenting responsibility while the father was merely regarded as a financial resource who might occasionally drop by for a visit. He paid his support and went on his way.

However, our society has changed rapidly in this area. Women have assumed more than just a nurturing role in our society and men in fact have frequently insisted on increased responsibility in the rearing of the children. We as a nation have become increasingly sophisticated in understanding both the needs of our children and the different parenting skills which fathers and mothers provide their children. We are much more aware of our children's needs for both parents to be actively involved in their lives. Each parent has something unique to offer. Just as it takes two parents to produce a child, so also does it take two parents to rear the child. This bill encourages the involvement of both parents in this increasingly complicated task. I ask your support for House Bill # 703.

JOINT CUSTODY

House Bill No. 703

Testimony 2/16/81, House Judiciary Committee

Alan D. Nicholson, Joint-Custody Parent

I am a joint-custody parent. My little boy, Aaron, will be 3 years old in two weeks. For about 18 months now, his mother and I have been sharing the warmth, the joy, the sorrow, the frustration, the responsibility and the privilege which is this little person. And he has been sharing us. He is bright, mischevious, loving, well behaved, spoiled, potty-trained and, thank God, on the other side of the terrible two's. He has a mother. He has a father. We both love him very much. It is not easy or painless or perfect, but I'm absolutely convinced it's the very best for him.

It was very hard. Tens of thousands of dollars were spent on legal fees and counselors fees. Hours were spent in lawyers offices and in the awsome presence of the court. Emotions and passions became exaggerated as each parent, tormented by the spectre of losing a child, fought to convince everyone that the other was unfit. Work went undone. Play was impossible. No living thing which touched either parent escaped the anguish, especially the object of it all, little Aaron.

Somehow it worked out. Threats, promises, counselors, jurists, lawyers, psychologists, psychiatrists, mental breaks, emotional fatigue, spirit, purpose, love, hate, growing and learning---somehow it worked out. We agreed to jointly petition the court to make permanent the temporary joint-custody order it had previously given with certain procedures, peculiar to one situation, for making it work.

Aaron's mother and I do not love each other. We do not even like each other. We do not agree on many fundamental things. We do, however, agree that our son and his welfare is of paramount concern to each of us. So, with the frequent exchanges of Aaron's physical presence, we are also exchanging anecdotes and observations about our son, about his doctors and babysitter, about his sickness

and his health, about his appropriate and inappropriate behaviors. And because we are equal, because we have joint responsibility, the hidden agenda is not about personal triumph, not about obliterating the other. (We have what Kissinger could only dream about for nations--we have detente'.) However disguised or open, our agenda is the same...to make Aaron's world the very best it can be and to do that within the context of joint parenting. As one of two very proud parents, I can report that Aaron is thriving and growing in this joint-parenting family with love of both of his parents shining fully on him.

This Bill, had it been around a year ago, would have given much guidance to us and would have saved much pain and expense. In this rapidly changing and increasingly perilous world it seems inappropriate to assume that the "best interests" of a child are always served by subjecting the child to sameness and routine, by avoiding conflict and change or by favoring the continuity of the physical surroundings and the appearances of a conventional family over the continuity of the love and responsibility of both parents and a shared family existence with each parent. What among humankind's oddesys sustains us more, gives us more hope, enriches us more, or gives us more faith in some kind of immortality than our relationships with our own children and our own parents? I urge passage of this timely Bill.

JOINT CUSTODY

HOUSE BILL NO. 703

Testimony 2/16/81, House Judiciary Committee

Excerpt From A Legal Journal

Regarding a California Statute Similar

To The One Now Before The Montana Legislature

JOINT CUSTODY, SOLE CUSTODY: A NEW STATUTE REFLECTS A NEW PERSPECTIVE

James A. Cook*

The greatest impact of California's new child custody Statute is the effect it will have upon the expectations and conduct of parents prior to a court hearing. Secondly, the new law modifies the options available to the court and the considerations which must be weighed in disposing of custody cases. Transition into the new concept may initially be difficult for the courts. However the burden of change will be lessened as the divorcing public becomes aware, in advance of custody proceedings, of the Statute's intent. The new Statute facilitates preservation of the child's needs for contact with both parents; it reduces use of the courtroom by one parent to destroy the other parent, to the detriment of the child's best interests. This new Statute's emphasis on joint custody is intended to alleviate other problems frequently generated under the former law:

1. Defusing child-stealing and support-avoidance

This legislative recognition of joint custody and its implementation by the courts may defuse and reverse the increasingly menacing recourse by excluded parents to "child stealing" and/or abandonment of financial support for lack of meaningful, frequent and extensive contact with their children. Legal practitioners have been reluctant to apply punitive or confiscatory sanctions in cases of child-stealing or abandonment of support. Observers have been uneasy about a legal solution that focused solely on punishment and support-collection on behalf of custodial parents, when many custodial parents share the responsibility for the provocation. Instead, joint custody provides an opportunity to demonstrate and increase respect for equality under the law while effecting a possible reduction of child-stealing and support-avoidance.

*James A. Cook has been a long time advocate of joint custody and was instrumental in the introduction and passage of A.B. 1480 by Assemblyman Charles Imbrecht (Ventura, California).

Assembly Bill 1480 appears at the end of this article as Exhibit A.

2. Redressing the imbalance between mother vs. father custody fights.

Additionally, it is intended that this new emphasis upon joint custody will result in tempering a recent trend of fathers to strive for sole custody. While the opportunity for fathers to compete for sole custody tests the equality of the sexes insofar as sole-custody decrees are concerned, the result is increasingly hostile custody battles because of a heightened expectation of unilateral victory by both parents. The new law will shift the view of equality—from a statistical determination of how frequently fathers rather than mothers achieve sole custody—to a decision based on protecting a child's access to both parents and on encouraging parental sharing of responsibility for the child.

3. Discouraging the use of child custody for intimidation.

The most immediately apparent feature of California's new child custody law is "the message it sends in advance to divorcing parents": a powerplay for exclusive child custody, either for purposes of intimidation or to force subservience in negotiation, is less likely to be tolerated by the court. Therein, the new Civil Code Section 4600 and 4600.5 is regarded as one of the most significant evolutions of California's family law since the advent of "no fault" divorce in 1970, which eliminated the airing of "faults" as justification for divorce. Henceforth, the new child custody Statute will largely dissolve the recourse to winner-take-all custody litigation that has heretofore been substituted for the catharsis of airing "faults."

Preference is likely to favor joint custody, or sole custodianship for that parent who demonstrates the most cooperation and tolerance for the child's frequent and continuing contact with the alternate parent. Consequently, an antagonistic and covetous parent is likely to be denied sole custody and may jeopardize the opportunity to participate equally in joint custody.

TESTIMONY OF CAROL A. MITCHELL
BEFORE THE JUDICIARY COMMITTEE,
of the HOUSE OF REPRESENTATIVES
February 16, 1981
RE: HOUSE BILL 703, Joint Custody of Children

HISTORICALLY: THE PARENT-CHILD RELATIONSHIP

Historically, children were viewed as chattel-property to be awarded. A hold-over of the Roman Law, the English and American Common Law viewed the natural parent, particularly the father, as having the presumptive right to care for his offspring without interference of the state.

In the late 19th and early 20th Centuries, the "paternal superiority" standard gradually gave way to one of "fault" of the spouse in determining which parent should have custody. This concept arose from the legal maxim that a person ought not to be allowed to profit from his own wrong-doing. And that the "innocent" parent could best provide for the child's future welfare. This, plus other social changes occurring at the time, most often resulted in a maternal preference.

In the early 20th Century, there developed a "tender years" doctrine, which held that, all things being equal, the mother was the natural, nurturing parent of the younger child.

These three standards: "paternal preference", "spousal fault", and "tender years" focused on the parent and not on the child, with the later two resulting in clear preference for the mother. As we began to accumulate formalized knowledge of child development, the law moved toward the "best interest of the child" standard. This is the status of the law currently in Montana today.

MONTANA'S LAW TODAY

The "best interest" standard is too often, even today, given only lip service by judges, lawyers and counselors bringing old biases and habits with them to the custody determination. They fail to incorporate into their thinking, the recent research of such people as Judith Wallerstein (whose 5 year study of children of divorces documents the conclusion that the principal factor in a child's adjustment to divorce is the continued, quality involvement of both parents.) Our common sense supports this conclusion!

The research indicates that too often a child fantasizes the image of the absent parent. "If only Dad were here, I would be happy." "Mom, would solve my problems." This, and many other adverse reactions, impacts the child's development and too often negatively affects the child's future relationships.

And, what about the parent and his or her rights and well-being? The story of the non-custodial parent who fails to visit or to support his or her children is a commonplace tale. That parent has been cut off, feels cut off and acts that way. And it is ironically often the parent who is a good parent during the marriage who reacts by withdrawing the most.

While not a cure-all, joint custody hopefully mitigates that separation and encourages continued involvement as a parent.

On a strictly legal basis, has the state the right to terminate a parent's custody without a showing of harm to the child? If we view the child simply as property, how can the custody of the child be severed without due process and a showing of substantial interest on the part of the state? Is it justice to have a parent face a divorce (from his/her spouse) with a presumption that one parental rights will be severed—just because that's the way these things are done?

WHY H.B. 703

Montana law today offers the courts the option of granting joint custody—and they are in those districts where particular lawyers or judges or counselors have taken an interest. But, we need to take the next step to standardize the law throughout the state. We need to pass H.B. 703 in order to incorporate the new research (and our own common sense) and to remediate the inaccurate biases of the judges, lawyers and counselors which do not serve the best interests of Montana's children and trample on one of the most precious and primary rights of their parents.

H.B. 703 does this. It would require the courts to look first at preserving the custodial rights of parents to their children and children to both of their parents. If there is a reason why both parents ought not to continue to have custody of their children, that one parent ought to be awarded sole custody, the court need only state the reason.

Additionally, H.B. 703 allows parents already divorced to seek to regain joint custody of their children if they can show that it would be in the best interests of their children.

Given the epidemic of child-knapping by parents and the plague of parents who do not financially (much less emotionally) support their children following a divorce, legislation which is aimed at ensuring the continued lawful involvement of parents with their children merits serious consideration and passage.

As an attorney and as a parent, I ask your support. Thank you.

HOUSE JUDICIARY COMMITTEE

Date 2/16/81

[illegible]

Form CS-33
1-81

MINUTES OF THE MEETING OF THE JUDICIARY COMMITTEE
February 20, 1981

The meeting of the House Judiciary Committee was called to order at 8:00 a.m. in Room 437 of the Capitol by Chairman Kerry Keyser. All members were present. Jim Lear, Legislative Council, was present.

HOUSE BILL 803 REP. BRAND, chief sponsor stated this bill's purpose is to change the definition of "peace officer" to include persons who are responsible for the care or custody of a prisoner. This will change the law when an inmate hits a prison guard it will be considered a felony instead of a misdemeanor. There seems to be no end to the violence inflicted upon the prison guards from inmates.

THOMAS SCHNIDER, MPEA, supports the bill. An attack on a prison guard was changed from felony to misdemeanor charge a few years ago. This will change it back. EXHIBIT 1 was given.

MIKE MORRIS, Montana State Prison, supported the bill. The situation is getting out of hand. Every time a man is sentenced he can appeal it many times. This situation is troublesome throughout the United States. It is very important to pass this bill. Inmates are allowed to get away with anything. There is a turnover rate of 60% every year at the prison because of the conditions. The backing is needed from the state.

SERGEANT RORNMOUS, Montana State Prison, stated today most prisoners are serving 100 years under no parole or furlough. The crime situation has changed. Several years ago 75% of the crimes of prisoners were money or nonviolent crimes and 25% were violent crimes. Today that situation is reversed. This situation happens at an alarming rate. Recently one guard was shot with a homemade dart. The prisoner received 6 months which was suspended. A prison guard is no different than a peace officer. They are working with known felons. The same basic training is received and federal and state laws have to be observed by the guard.

There were no opponents.

In closing the sponsor felt this is a serious problem. There are more heart attacks and mental problems of these guards all the time.

REP. TEAGUE asked if there was a possibility this could go the opposite way. It was possible it could happen. If a prison guard hits a prisoner he could be suspended. A guard is not likely to cause trouble when he is outnumbered 620 to 1.

FRANK WELCH told the committee the guards are governed by state laws. If they overstep those boundaries they are subject to rules. They might end up being an inmate themselves if they are not careful.

HOUSE BILL 690 REP. KEEDY moved do pass. The motion carried unanimously.

HOUSE BILL 698 REP. MCLANE moved do pass.

REP. HANNAH moved to insert "civil" on page 4, line 25 following "constitutes" and to strike through line 2 on page 5 following "contempt". The motion passed unanimously.

REP. MCLANE moved do pass as amended. The motion carried unanimously.

HOUSE BILL 703 REP. EUDAILY moved do pass.

REP. HANNAH was against the motion. Children are in the middle of divorces. Problems will increase concerning remarriages. REP. CURTISS Agreed.

REP. HUENNEKENS stated if there had to be a divorce he would want the opportunity to continue to see and have contact with his children. REP. HANNAH agreed with that but was not comfortable with the bill.

REP. SEIFERT thought this would create more problems than it would solve. Joint custody will add to the problems.

REP. CONN thought it was a good bill since children and parents need each other when divorce occurs.

REP. MATSKO stated with joint custody a parent can take the child away from the other parent. Police officers cannot do anything since they both have custody. This bill could result in those types of problems.

REP. SHELDEN stated this bill gives the courts and the people involved a way to go.

REP. BENNETT made a motion to insert "with the consent of both parties" after "may" on line 16, page 3. The amendment resulted in a roll call vote. Those voting yes were: KEYSER, SEIFERT, BENNETT, CURTISS, IVERSON, ANDERSON, DAILY, HUENNEKENS, and TEAGUE. Those voting no were: CONN, EUDAILY, HANNAH, MATSKO, MCLANE, ABRAM SHELDEN and BROWN. The amendment passed 9 to 8.

REP. EUDAILY moved do pass as amended. The motion carried with SEIFERT, MCLANE, CURTISS and HANNAH voting no.

FORTY-SEVENTH LEGISLATIVE SESSION

COMMITTEE ON JUDICIARY

HOUSE BILL NO.	ENTERED COMM.	DATE CONSIDERED	OUT OF COMM.	DO PASS DATE	DO NOT PASS DATE	DO PASS AS AMEND. DATE	BE CON- CURRED IN DATE	BE CONC. IN AS AMENDED DATE	BE NOT CON- CURRED IN DATE
HB 535	3/03/81	3/16/81	3/17/81				3/17/81		
HB 536	3/03/81	3/16/81	3/25/81				3/25/81		
HB 537	3/03/81	3/16/81	3/17/81				3/17/81		
HB 538	3/04/81	3/19/81	3/23/81					3/23/81	
HB 598	2/18/81	3/05/81	3/05/81					3/05/81	
HB 612	3/04/81	3/19/81	3/21/81						3/21/81
HB 621	2/18/81	3/16/81	3/17/81					3/17/81	
HB 626	3/03/81	3/10/81	3/16/81						3/16/81 (amended)
HB 656	2/23/81	3/05/81	3/25/81	tabled					
HB 678	3/03/81	3/19/81	3/21/81				3/21/81		
HB 689	3/03/81	3/10/81	3/24/81					3/24/81	
HB 690	3/03/81	3/10/81	3/14/81				3/14/81		
HB 698	3/04/81	3/18/81	3/21/81				3/21/81		
HB 703	3/04/81	3/18/81	3/25/81					3/25/81	
HB 711	3/04/81	3/18/81	3/18/81				3/18/81		
HB 713	3/04/81	3/17/81	3/21/81				3/21/81		

Use a separate sheet for Senate, House Bills, and Resolutions.

HOUSE BILL NO. 703

INTRODUCED BY DUSSAULT, MAZUREK

A BILL FOR AN ACT ENTITLED: "AN ACT TO ESTABLISH A PREFERENCE FOR JOINT CUSTODY AWARDS UPON DISSOLUTION OF MARRIAGE; ESTABLISHING AN ORDER OF PREFERENCE ACCORDING TO THE BEST INTERESTS OF THE CHILD; AND ALLOWING THE NONCUSTODIAL PARENT ACCESS TO RECORDS."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Declaration of legislative intent -- joint custody. (1) The legislature of the state of Montana finds and declares that it is the public policy of this state to assure minor children frequent and continuing contact with both parents after the parents have separated or dissolved their marriage and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy. The legislature believes that the district courts of the state of Montana have the authority to award joint custody to any interested party if the court finds joint custody in the best interests of the children in the case then before the court. The intent of [this act] is to establish preferences and certain guidelines for resolution of custody disputes.

Section 2. Award of joint or separate custody. In

custody disputes involving both parents of a minor child, custody shall be awarded in the following order of preference according to the best interests of the child as set out in 40-4-212:

(1) to both parents jointly pursuant to [section 3]. The court, in its discretion, may require the submission to the court of a plan for the implementation of the joint custody order; or

(2) to either parent. In making an award to either parent, the court shall consider, along with the factors set out in 40-4-212, which parent is more likely to allow the child frequent and continuing contact with the noncustodial parent and may not prefer a parent as custodian because of the parent's sex. The court, in its discretion, may require the submission to the court of a plan for the implementation of the custody order.

Section 3. Presumption in favor of joint custody -- modification -- consultation with professionals. (1) Upon application of either parent or both parents for joint custody, there is a presumption, affecting the burden of proof, that joint custody is in the best interests of a minor child. If the court declines to enter an order awarding joint custody the court shall state in its decision the reasons for denial of an award of joint custody.

(2) For the purposes of this section, "joint custody"

1 means an order awarding custody of the minor child to both
2 parents and providing that the residency of the child shall
3 be shared by the parents in such a way as to assure the
4 child frequent and continuing (but not necessarily equal)
5 contact with both parents.

6 (3) Any order for joint custody may be modified
7 pursuant to 40-4-219 to terminate the joint custody. If
8 modification is granted and either parent opposes the
9 modification, the court shall state in its decision the
10 reasons for modification.

11 (4) Any order for the custody of a minor child entered
12 by a court in this state or any other state may, subject to
13 appropriate jurisdictional requirements, be modified at any
14 time to an order of joint custody in accordance with the
15 provisions of 40-4-212 and [this act].

16 (5) The court may WITH THE CONSENT OF BOTH PARTIES, at
17 any time, direct the parties to consult with appropriate
18 professionals for the purpose of assisting the parties to
19 formulate a plan for implementation of the custody order or
20 to resolve any controversy that has arisen in the
21 implementation of a plan for custody.

22 Section 4. Access to records by noncustodial parent.
23 Notwithstanding any other provision of law, access to
24 records and information pertaining to a minor child,
25 including but not limited to medical, dental, law

1 enforcement, and school records, may not be denied to a
2 parent because such parent is not the child's custodial
3 parent.

4 Section 5. Codification instruction. Sections 1
5 through 4 are intended to be codified as an integral part of
6 Title 40, chapter 4, part 2.

-End-

MINUTES OF MEETING
SENATE JUDICIARY COMMITTEE
March 18, 1981

The forty-sixth meeting of the Senate Judiciary Committee was called to order by Mike Anderson, Chairman, on the above date in Room 331, at 10:00 a.m.

ROLL CALL:

All members were present.

CONSIDERATION OF HOUSE BILL 711:

TO GENERALLY REVISE THE LAWS REGULATING
NOTARIES PUBLIC.

The bill was presented by Rep. Harper as a simple bill to update the law.

Don Coburn spoke in support as the originator of the bill.

Senator Mazurek asked Mr. Coburn if notaries generally charge fees for their services. Mr. Coburn said that notaries who take depositions quite often do, but many notaries who just notarize signatures do not charge a fee.

CONSIDERATION OF HOUSE BILL 773:

TO PROVIDE FOR RECORDING AND DISTRIBUTION OF SENTENCING DATA PERTAINING TO PERFORMANCE OF DISTRICT COURT JUDGES.

The bill was presented by Rep. Keedy, who pointed out that voting a judge out of office is not always the threat that it would seem, because many practicing attorneys are going to be reluctant to run against an incumbent judge. He added that people should have as much information available to them as possible, and that this bill would help give the public access to reasonably compiled and reasonably useful data.

David Stewart read from his written testimony, which is attached to these minutes.

Senator Mazurek asked why the list of items to be forwarded to the clerk of court did not include the result and how the sentence was obtained. Rep. Keedy said that he would not object to having the information included relative to whether the sentence was a plea or a verdict. In response to another

question by Senator Mazurek, Rep. Keedy stated that the clerk would make photocopies of the judge's remarks to forward, not write out copies.

David Niss referred to page 2, line 12, and asked if it was Rep. Keedy's intent to have only one type of sentence reported per month, even if more than one type of sentence was handed down. Rep. Keedy felt that it specified that every instance would be reported.

Senator Anderson asked if there was a fiscal note with this bill. Keedy replied that there was not, and that he felt the fiscal impact would be minimal because the reports would consist of information that was readily available.

Senator Anderson mentioned the publication of the LAYMAN'S GUIDE TO PHYSICIANS' SERVICES, which was a record compiled of the cures and deaths resulting from surgeries performed by various surgeons. He said that because the top surgeons were given the hardest cases to try to cure, their records ended up looking the worst because of a high death rate. He said that he feared a similar situation could develop with judges under this bill if it becomes law.

Senator Crippen directed attention to page 2, line 10, and asked why these reports would be made monthly rather than on a quarterly or semi-annual basis. Rep. Keedy replied that it might be better to change this to "quarterly".

CONSIDERATION OF HOUSE BILL 703:

TO ESTABLISH A PREFERENCE FOR JOINT
CUSTODY AWARDS UPON DISSOLUTION OF
MARRIAGE.

The bill was presented by Rep. Dussault.

Senator Mazurek, District 16, Helena, testified in support of the bill, saying that joint custody is preferable to sole custody in many cases. He said that when one parent is awarded sole custody there tends to be a divorce of the family, as well as the parents. He said that this bill was patterned after California law. He pointed out that "joint custody" means joint responsibility, not necessarily physical presence. He felt that enough parents are currently working out successful joint custodies that this alternative should be required in the law.

Joan Uda, Helena attorney, supported the bill and read from a written statement by Alan Nicholson, an affected parent. Her testimony, and that of Mr. Nicholson (attached Exhibit C), is attached to these minutes. She defined the intent of this bill

as avoiding the casual severing of responsibility for and contact with their children by divorcing parents.

Jim Mallard and Skip Culver testified for the bill as divorced fathers who could have been helped had this bill been law.

Cathy Kendall gave expert testimony that joint custody is in the best interests of the children involved in divorce.

Ann Smoyer, Helena attorney, supported the bill as shown on her attached testimony sheet.

Alan Joscelyn, Helena attorney involved in custody proceedings wherein he represents the interests of children, said that he felt the bill would be beneficial. He also stated that an expert witness from Carroll College would like to submit written testimony, and received permission from the committee for him to send it.

Speaking in opposition to the bill, J. C. Weingartner, representing the State Bar of Montana, pointed out possible practical problems with Section 3. He said that it creates a presumption that joint custody is a way to solve problems, and takes away the court's discretion in determining the best solution. He added that not all parents can get along well enough to make joint custody work. He felt that this bill might result in additional time spent before the court trying to modify joint custodies in order to make them work.

Clare Luebeck read from written testimony, which is attached to these minutes, in opposing passage of this bill.

In closing, Rep. Dussault said that this bill would tend to force the divorcing parties to accept continued responsibility for and contact with the children. She said that page 2, line 5 allows for a plan to be drawn out to fit the individual needs, and does not demand that physical custody alter from one location to another throughout the year.

Senator Crippen referred to a letter he had received from a Billings judge who opposes this bill, saying that current law allows for joint custody agreements to be reached, and asked Mrs. Uda to respond. Mrs. Uda replied that in almost every case joint custody is superior for both the children and the parents. She added that because of the great divorce rate this custody issue is becoming more and more important, and forcing amicable handling of custody is therefore doubly important.

Senator Mazurek asked Mrs. Uda about the presumption which takes away the court's discretion. She said the bill only dictates that if there is a contest, the preferred solution

is joint custody. It does not limit the judge to only that choice, however.

Senator Crippen pointed out that in the bill the judge does have the right to choose something other than joint custody, and asked J. C. Weingartner to address this. Mr. Weingartner felt that under the bill one more hurdle would be placed for the judge to overcome before arriving at a custody solution.

Senator Mazurek asked Cathy Kendall if, in her experience, children were ever actually uprooted from school and moved from parent to parent throughout the year, as had been suggested in Mrs. Luebeck's testimony. Ms. Kendall said that in her four years of handling some thirty to forty cases, she has never encountered this situation.

Mrs. Uda brought up the increasing situations involving child-snatching, and said that this bill would give enough control into the hands of both parents to possibly alleviate this practice.

CONSIDERATION OF HOUSE BILL 698:

TO PROVIDE THAT A DEFENDANT WHO IS PROVIDED WITH COURT-APPOINTED COUNSEL MAY BE REQUIRED UPON CONVICTION TO REPAY THE COSTS OF COUNSEL.

Rep. Meyer presented the bill, saying that it included all the strongest points of Oregon law on this subject. He said that one county in Oregon recovered thirty thousand dollars in one month after passing similar legislation.

Senator Mazurek asked whether, if such a judgment were passed, it could be overcome through filing bankruptcy. Rep. Meyer did not know if this would be the case.

Senator Crippen said that this type of law could affect the number of appeals raised, because if the defendant knew he would have to pay the cost, he might not be as willing to make the appeal.

DISPOSITION OF HOUSE BILL 711:

Senator S. Brown moved that the bill BE CONCURRED IN, and his motion passed over the opposition of Senator Mazurek.



Mike Anderson
Chairman, Judiciary Committee

ROLL CALL

JUDICIARY COMMITTEE

47th LEGISLATIVE SESSION - - 1981

Date March 18, 198

NAME	PRESENT	ABSENT	EXCUSED
Anderson, Mike, Chr. (R)	✓		
O'Hara, Jesse A. (R)	✓		
Olson, S. A. (R)	✓		
Brown, Bob (R)	✓		
Crippen, Bruce D. (R)	✓		
Tveit, Larry J. (R)	✓		
Brown, Steve (D)	✓		
Berg, Harry K. (D)	✓		
Mazurek, Joseph P. (D)	✓		
Halligan, Michael (D)	✓		

Each day attach to minutes.

(46)

Testimony on H.B. 703, re: Joint Custody
Prepared by Joan Uda, Attorney at Law
March 18, 1981
Senate Judiciary Committee

Mr. Chairman and Committee Members:

I am an attorney in private practice in Helena. In my practice I handle a great many dissolutions of marriage and custody matters. Based on my experience as an attorney in this field, as a school teacher before becoming a lawyer, and as a mother of four children, I believe this bill offers substantial benefits to children of divorced parents, and to their parents.

Our present law on custody of children following a divorce is the result of haphazard growth over the years, and is not, as one might assume, the result of thoughtful planning. A century ago, in the rare event of divorce, the children went with the father, excluding the mother. As a reaction to that situation, we developed the "maternal preference," which for many years reversed the situation to the point that any father who wanted custody of his children was considered peculiar, and a father had very little if any chance of getting custody. Today, divorce is all too common, and just now our understanding of the effects of divorce on children is beginning to cause some rethinking of the traditional either/or custodial pattern.

Most children are born with two living, present parents. Both parents have rights and obligations toward their children. However, the usual "sole custody" arrangement has certain effects on the parent/parent and parent/child relationships

which we are only now beginning to understand and address. What the sole custody arrangement does, in fact and in law, is to terminate virtually all rights of the non-custodial parent to his children except the right of periodic "visitation." The non-custodial parent has no legal say in how the child is reared at all. Further, the sole custody arrangement terminates the non-custodial parent's obligations except the obligation to pay a periodic amount of child support - often a quite inadequate amount, giving the cost of raising a child.

If the state wants to terminate a parents rights and place a child in foster care, the state must follow complicated procedures designed to protect the child's and the parent's rights. This is so even if the child has been subjected to the most gruesome sorts of child abuse by the parent. However, in divorce situations, we do this all the time, often very casually, and with little attention to the rights and obligations of the parents or the children.

This bill is intended to address that situation, by making joint custody - retaining the child in the custody of both parents, the way he was born and raised until the divorce - the preferred option if either or both parents request. It raises a presumption that this is in the best interests of the children involved, unless the court finds that that there are facts showing that it is not in the children's best interests.

We believe that the bill will put some pressure on divorcing parents, as it properly should be, to reach agreement between themselves as to the best custodial arrangement for their

children, rather than to battle out custody in court. This is so because all too often, custody battles result when parents cannot agree which one of them "gets the kids," as if the children were a washing machine or car. And, far too often, the divorcing couple fight out their anger toward each other through the battle over who gets custody, so that one of them can emerge the "winner," with the "prize." And, very often, both parents are basically decent people, good parents, and there is no real reason either of them should "lose" their children to the other.

This bill, if enacted, would tell them in no uncertain terms that if both are basically decent people and good parents, both will have custody, and both will remain parents for life, as they properly should. Thus, lawyers will learn to advise their clients that if they cannot prove that the other parent is truly not fit, they had best start working toward a reasonable agreement with the other parent, because that is what will happen anyway if they fight it out in court.

On the other hand, if one parent is truly not fit, that can and should be brought to the court's attention, and sole custody would still be most appropriate under those circumstances.

In short, we believe the bill would be a great disincentive for custody fights, thus relieving some of the pressure on the courts which must handle so many of these matters.

The emerging research on children from divorced families shows clearly that the single most important factor in such

children's emotional health and stability after divorce is a strong continuing relationship with both parents.

For the above reasons, I strongly urge that this Committee give H.B. 703 a "Do Pass" recommendation.

Exhibit A

March 2, 1981

Hon. Stan Stephens
Montana Senate
Capitol Building
Helena, Montana 59601

Re: H. B. 703

Dear Stan:

H. B. 703 creates a presumption that joint custody is a priori the preferred custody arrangement in such cases, as being in the best interests of the children.

I've done research on the proposition of joint custody arrangement and can find no empirical studies supporting it. I do find some sociologists in favor, but their arguments are primarily subjective.

My own experience of almost forty years involving custody arrangements militates against it. If one of the parties opposes the idea, then, almost invariably, there is trouble over how, when and where the children will be, and a Judge has the problem back in his lap.

The only assurance of success in joint custody is if the parents are agreeable. In those cases, even if custody is decreed in one, the parents create a de facto custody arrangement.

Judges already have the power to create joint custody arrangements under MCA 40-4-212, and are doing it. They are already required to make findings and conclusions supporting custody decrees, and are doing it.

When the new marriage, divorce and custody laws were enacted in Chapter 536, 1975 Laws, it was argued that divorce and custody would simplify the field and relieve the courts of an increasingly crushing burden; that it would lessen legal costs, and make things so simple, a party could pursue dissolution and custody on their own, and without benefit of counsel.

(46)

Hon. Stan Stephens
March 2, 1981
Page Two

However, the consequences of these laws are a greater court workload, and increased labor and fees for lawyers.

I think, if the district judges were surveyed, it would be found that criminal and marriage laws have emburdened courts to a far greater extent than any other fields of law.

Legislative session no longer passes without a bill asking a new judgeship in the busier districts.

Parties and their lawyers, rather than relying on present divorce and custody laws, will seize on the semantics and ambiguities of H.B. 703 to carry on litigation.

Under H.B. 703, the legislature declares joint custody is in the best interests of the children involved. This simply isn't so. Every child custody case has a different set of circumstances upon which a custodial adjudication is based, though they often seem quite similar.

Experience shows that the parent not having actual physical custody becomes varyingly disinterested in his children by former marriage. In this day of loosening family bonds, an original joint custody decree could well hamstring the efforts of the parent in custody.

There is no showing that H.B. 703 has undergone examination by a representative field of judges and lawyers who are actively involved in these matters.

I see no present urgency for this legislation. It seems to require more study.

I think an interim committee or staff could survey the experience and opinion of judges who deal with the matter almost every judicial day.

I think a study should be made as to its effect on judicial workloads and increased costs.

I know it is going to cost more in legal expense to the parties. H.B. 703 simply creates more opportunity for further litigation in matters of custody.

EHS

Hon. Stan Stephens

March 2, 1981

Page Three

As previously pointed out, there is no question that present marriage and custody laws have been significant factors in the need for more judgeships.

H.B. 703 doesn't do anything which can't be done now, except it guarantees more work and expense for court and bench and, most likely, more work and expense for child welfare agencies.

Very truly yours,



J. Chan Ertien

JCE/ta

P.S. I assume this is in Judiciary. Would you steer a copy of the letter to the proper committee?

TESTIMONY TAKEN BY TELEPHONE MARCH 18, 1981, at 9:22 a.m.

Subject John Fowler, of Wyola, Montana, had intended to be here this morning to testify in favor of HB 703, but is currently in the hospital in Salt Lake City. Therefore, he called in this testimony and asked that it be considered.

Mr. Fowler is divorced, and awaiting a decision on custody. He and his wife have petitioned for joint custody, and he believes that when the parents are both willing to take the interests of the child ahead of their own, it is preferable to handle it that way.

Speaking of his two-year-old son, he said, "I feel he definitely needs the influence of both of us, and needs the traditional father figure in his life, but also he needs the mother. Just because the parents cannot get along, there is no reason why the child cannot interact with both parents. Also, I feel that it is to the advantage of both parents for joint custody to be worked out. Both the child and the parents would benefit from the joint custody. They would both have periods of freedom from the responsibility, and periods of time to spend with the child.

"I agree particularly with the part of the bill that says there should be a professional of some kind involved in laying the groundwork for the type of custody situation which will fit the family situation. There is not a pat answer for every family."

He said that he would definitely urge support for the bill, and added that he had contacted his attorney who may be bringing expert testimony to the hearing this morning.

JOINT CUSTODY

House Bill No. 703

Testimony 2/16/81, Senate Judiciary Committee

Alan D. Nicholson, Joint-Custody Parent

I am a joint-custody parent. My little boy, Aaron, will be 3 years old in two weeks. For about 18 months now, his mother and I have been sharing the warmth, the joy, the sorrow, the frustration, the responsibility and the privilege which is this little person. And he has been sharing us. He is bright, mischevious, loving, well behaved, spoiled, potty-trained and, thank God, on the other side of the terrible two's. He has a mother. He has a father. We both love him very much. It is not easy or painless or perfect, but I'm absolutely convinced it's the very best for him.

It was very hard. Tens of thousands of dollars were spent on legal fees and counselors fees. Hours were spent in lawyers offices and in the awsome presence of the court. Emotions and passions became exaggerated as each parent, tormented by the spectre of losing a child, fought to convince everyone that the other was unfit. Work went undone. Play was impossible. No living thing which touched either parent escaped the anguish, especially the object of it all, little Aaron.

Somehow it worked out. Threats, promises, counselors, jurists, lawyers, psychologists, psychiatrists, mental breaks, emotional fatigue, spirit, purpose, love, hate, growing and learning---somehow it worked out. We agreed to jointly petition the court to make permanent the temporary joint-custody order it had previously given with certain procedures, peculiar to one situation, for making it work.

Aaron's mother and I do not love each other. We do not even like each other. We do not agree on many fundamental things. We do, however, agree that our son and his welfare is of paramount concern to each of us. So, with the frequent exchanges of Aaron's physical presence, we are also exchanging anecdotes and observations about our son, about his doctors and babysitter, about his sickness



and his health, about his appropriate and inappropriate behaviors. And because we are equal, because we have joint responsibility, the hidden agenda is not about personal triumph, not about obliterating the other. (We have what Kissinger could only dream about for nations--we have detente'.) However disguised or open, our agenda is the same...to make Aaron's world the very best it can be and to do that within the context of joint parenting. As one of two very proud parents, I can report that Aaron is thriving and growing in this joint-parenting family with love of both of his parents shining fully on him.

This Bill, had it been around a year ago, would have given much guidance to us and would have saved much pain and expense. In this rapidly changing and increasingly perilous world it seems inappropriate to assume that the "best interests" of a child are always served by subjecting the child to sameness and routine, by avoiding conflict and change or by favoring the continuity of the physical surroundings and the appearances of a conventional family over the continuity of the love and responsibility of both parents and a shared family existence with each parent. What among humankind's oddeys sustains us more, gives us more hope, enriches us more, or gives us more faith in some kind of immortality than our relationships with our own children and our own parents? I urge passage of this timely Bill.

46

JOINT CUSTODY

HOUSE BILL NO. 703

Testimony 2/16/81, Senate Judiciary Committee

Excerpt From A Legal Journal

Regarding a California Statute Similar

To The One Now Before The Montana Legislature

46

JOINT CUSTODY, SOLE CUSTODY: A NEW STATUTE REFLECTS A NEW PERSPECTIVE

James A. Cook*

The greatest impact of California's new child custody Statute is the effect it will have upon the expectations and conduct of parents prior to a court hearing. Secondly, the new law modifies the options available to the court and the considerations which must be weighed in disposing of custody cases. Transition into the new concept may initially be difficult for the courts. However the burden of change will be lessened as the divorcing public becomes aware, in advance of custody proceedings, of the Statute's intent. The new Statute facilitates preservation of the child's needs for contact with both parents; it reduces use of the courtroom by one parent to destroy the other parent, to the detriment of the child's best interests. This new Statute's emphasis on joint custody is intended to alleviate other problems frequently generated under the former law:

1. Defusing child-stealing and support-avoidance

This legislative recognition of joint custody and its implementation by the courts may defuse and reverse the increasingly menacing recourse by excluded parents to "child stealing" and/or abandonment of financial support for lack of meaningful, frequent and extensive contact with their children. Legal practitioners have been reluctant to apply punitive or confiscatory sanctions in cases of child-stealing or abandonment of support. Observers have been uneasy about a legal solution that focused solely on punishment and support-collection on behalf of custodial parents, when many custodial parents share the responsibility for the provocation. Instead, joint custody provides an opportunity to demonstrate and increase respect for equality under the law while effecting a possible reduction of child-stealing and support-avoidance.

*James A. Cook has been a long time advocate of joint custody and was instrumental in the introduction and passage of AB 1480 by Assemblyman Charles Imbrecht (Ventura, California).

Assembly Bill 1480 appears at the end of this article as Exhibit A

2. Redressing the imbalance between mother vs. father custody fights.

Additionally, it is intended that this new emphasis upon joint custody will result in tempering a recent trend of fathers to strive for sole custody. While the opportunity for fathers to compete for sole custody tests the equality of the sexes insofar as sole-custody decrees are concerned, the result is increasingly hostile custody battles because of a heightened expectation of unilateral victory by both parents. The new law will shift the view of equality—from a statistical determination of how frequently fathers rather than mothers achieve sole custody—to a decision based on protecting a child's access to both parents and on encouraging parental sharing of responsibility for the child.

3. Discouraging the use of child custody for intimidation.

The most immediately apparent feature of California's new child custody law is "the message it sends in advance to divorcing parents": a powerplay for exclusive child custody, either for purposes of intimidation or to force subservience in negotiation, is less likely to be tolerated by the court. Therein, the new Civil Code Section 4600 and 4600.5 is regarded as one of the most significant evolutions of California's family law since the advent of "no fault" divorce in 1970, which eliminated the airing of "faults" as justification for divorce. Henceforth, the new child custody Statute will largely dissolve the recourse to winner-take-all custody litigation that has heretofore been substituted for the catharsis of airing "faults."

Preference is likely to favor joint custody, or sole custodianship for that parent who demonstrates the most cooperation and tolerance for the child's frequent and continuing contact with the alternate parent. Consequently, an antagonistic and covetous parent is likely to be denied sole custody and may jeopardize the opportunity to participate equally in joint custody

(46)

NAME: James E. Mallard DATE: 3-18-81

ADDRESS: 2480 E. Broadway 14B, Helena

PHONE: 443-0827

REPRESENTING WHOM? Myself

APPEARING ON WHICH PROPOSAL: HB 703

DO YOU: SUPPORT? ☒ AMEND? ☐ OPPOSE? ☐

COMMENTS: _____

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

DATE: 3-18-81

ADDRESS: 1020 9th Helms

PHONE: 442-2746

REPRESENTING WHOM? Myself

APPEARING ON WHICH PROPOSAL: HB 703

DO YOU: SUPPORT? X AMEND? _____ OPPOSE? _____

COMMENTS: _____

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

dh

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

NAME: Ann K. Smoyer DATE: 3/18/81

ADDRESS: 1085 Helena Ave, Helena, Mont.

PHONE: 442-3625

REPRESENTING WHOM? ^{myself} Attorney in private practice

APPEARING ON WHICH PROPOSAL: N.B. 703 - joint Custody

DO YOU: SUPPORT? ☒ AMEND? ☐ OPPOSE? ☐

COMMENTS: I feel that this bill
will create a situation
where the parties will
attempt to resolve other
dissolution issues without
using children as a means
or club to resolve property
disputes. It will also provide
more input by both parents
into the rearing of the
children

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

NAME: Alan Joscelyn DATE: 3/18/81

ADDRESS: Diamond Block, Helena

PHONE: 443-5554

REPRESENTING WHOM? Self

APPEARING ON WHICH PROPOSAL: HP 703

DO YOU: SUPPORT? ☒ AMEND? ☐ OPPOSE? ☐

COMMENTS: Creation of presumption in favor of joint
custody will result in parents making better
arrangements for children with less stress
and bitterness

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

(26)

NAME: Clare Luciani DATE: 3-18-81

ADDRESS: 2710 Bridgeway

PHONE: 494-7853

REPRESENTING WHOM? None

APPEARING ON WHICH PROPOSAL: 2-11-83

DO YOU: SUPPORT? AMEND? OPPOSE? 1

COMMENTS: Attached

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

Class Subject
5970. Excess
Hester, Mont.
5970.

I would like to take this
opportunity of writing again
H.B. 3 and to mention

I am greatly involved in a
custody case and in divorce,
there is an acknowledged
about child custody - the
process of the child's own
life. I can see nothing out
Chaos & confusion in every
area for the child's welfare
involved.

Using my own personal
interest and experience I feel
strongly that a child should
not work as well as the majority
of cases.

I think it is important to
mention the child's welfare
constantly mentions the "best
interest of the child". I strongly

(12)

but flexibility also is necessary for the achievement of a sound decision in the individual case. More important than the issue of one presumption versus another is the reform of the decision-making process itself so that Courts act affirmatively to safeguard the best interests of children.

The trouble is that the experience of most lawyers is that the typical client is embittered during and after divorce and is not prepared to accept the continuing contact with the other parent that joint custody requires.

Thank you for your indulgence.
Clare Luebeck
2710 Ashcroft
Butte, Mont. 59701

DATE March 18, 1981

COMMITTEE ON JUDICIARY

HB 773

HB 711

HB 703

HB 698

VISITORS' REGISTER

[illegible]

(Please leave prepared statement with Sergeant)

MINUTES OF MEETING
SENATE JUDICIARY COMMITTEE
MARCH 24, 1981

The fifty-first meeting of the Senate Judiciary Committee was called to order by Mike Anderson, Chairman, on the above date in Room 331, at 10:00 a.m.

ROLL CALL:

All members were present.

DISPOSITION OF HOUSE BILL 316:

Senator Mazurek moved to reconsider the action taken March 14, which resulted in a "be not concurred in" vote. He said that this bill merely puts into law what the practice has been since 1975. His motion carried unanimously. Senator Mazurek then moved that the bill BE CONCURRED IN, and his motion passed over the objection of Senators Tveit and Olson.

DISPOSITION OF HOUSE BILL 66:

Senator B. Brown moved that the bill BE CONCURRED IN, and his motion passed with Senators Anderson, O'Hara, Olson, and Berg opposing, as shown on the attached roll call vote.

DISPOSITION OF HOUSE BILL 273:

Senator Crippen moved to amend the bill as shown on the attached Committee Report, and his motion passed over the objection of Senators O'Hara and S. Brown. Senator Berg moved that the bill BE NOT CONCURRED IN, since the law is presently adequate if enforced, and his motion passed over Senator S. Browne' objection.

DISPOSITION OF HOUSE BILL 403:

Senator S. Brown moved to amend the bill as shown on the attached Committee Report, and his motion passed over Senator Tveit's objection. Senator S. Brown then moved that the bill BE CONCURRED IN AS AMENDED, and the motion carried over the objection of Senators Anderson, Olson, Crippen, and Tveit, as shown on the attached roll call vote.

DISPOSITION OF HOUSE BILL 12:

Senator O'Hara moved that the bill BE CONCURRED IN, and his motion passed over the opposition of Senators Halligan, Mazurek, Crippen, and B. Brown.

DISPOSITION OF HOUSE BILL 8:

Senator Berg moved that the bill BE NOT CONCURRED IN, and his motion carried over the opposition of Senators O'Hara and Tveit.

Senator S. Brown at this point wanted to have the record show that the committee's legal staff member, David Niss, has throughout the session done an exceptionally good job for the committee.

DISPOSITION OF HOUSE BILL 214:

Senator S. Brown moved that the bill BE NOT CONCURRED IN, and his motion carried over the objection of Senator O'Hara.

DISPOSITION OF HOUSE BILL 689:

Senator O'Hara moved that the bill be amended according to the attached Committee Report, and his motion passed unanimously. Senator O'Hara then moved that the bill BE CONCURRED IN AS AMENDED, and his motion passed over the objection of Senators Berg and Crippen.

DISPOSITION OF HOUSE BILL 212:

Senator B. Brown moved that the bill BE CONCURRED IN, and his motion passed unanimously.

DISPOSITION OF HOUSE BILL 213:

Senator Crippen moved that the bill be not concurred in, and his motion failed. Senator Mazurek then moved that the bill be amended as shown on the attached Committee Report, and his motion carried unanimously. Senator O'Hara then moved that the bill BE CONCURRED IN AS AMENDED, and his motion passed over the opposition of Senators Berg, Olson, and Tveit.

FURTHER CONSIDERATION OF HOUSE BILL 703:

Senator Mazurek proposed five amendments, none of which was moved or adopted. He asked the committee to wait until March 25 to take action on this bill, and the committee agreed to do so.



Mike Anderson
Chairman, Judiciary Committee

ROLL CALL

JUDICIARY COMMITTEE

47th LEGISLATIVE SESSION - - 1981

Date March 24, 1981

NAME	PRESENT	ABSENT	EXCUSED
Anderson, Mike, Chr. (R)	✓		
O'Hara, Jesse A. (R)	✓		
Olson, S. A. (R)	✓		
Brown, Bob (R)	✓		
Crippen, Bruce D. (R)	✓		
Tveit, Larry J. (R)	✓		
Brown, Steve (D)	✓		
Berg, Harry K. (D)	✓		
Mazurek, Joseph P. (D)	✓		
Halligan, Michael (D)	✓		

Each day attach to minutes.

MINUTES OF MEETING
SENATE JUDICIARY COMMITTEE
MARCH 25, 1981

The fifty-second meeting of the Senate Judiciary Committee was called to order by Mike Anderson, Chairman, on the above date in Room 331, at 10:00 a.m.

ROLL CALL:

Every member was present.

CONSIDERATION OF AMENDMENTS TO COMMITTEE BILLS:

Relative to the two proposed committee bills drawn for the purpose of reinstituting the small claims court system in Montana, amendments had been prepared by David Niss which would answer some of the problems described by Gladys Vance, a Cascade County justice.

Senator Anderson described the problem in Cascade County as being one of scheduling ten or fifteen cases to be heard, only to have one or two appear at the given time. He said that the suggested amendments would help the non-appearance problem.

Mike McCabe, Helena justice, said that the problem is much worse in Cascade County than it is anywhere else in the state, and the present default provision is adequate remedy if it is just used. He also objected to the six-day response requirement contained in the bills.

Senator Mazurek stated that he also disliked the amendments because they turned the small claims court into something more complicated and therefore less available to the people it is intended to help.

Senator Crippen felt that the amendments would do the reverse of the intent of the bill, which is to get more of these actions settled in the small claims court.

CONSIDERATION OF SENATE BILL 485:

CREATING A SMALL CLAIMS COURT
PROCEDURE WITHIN JUSTICE'S
COURT (REMOVAL PROVISION)

David Niss explained that the bill would repeal all of current Title 25, chapter 35, relative to the small claims court within justice's court. He pointed to the two new

DISPOSITION OF HOUSE BILL 656:

Senator S. Brown moved to table the bill, and his motion carried.

DISPOSITION OF HOUSE BILL 703:

Senator Mazurek proposed that the bill be amended as shown on the attached Committee Report. Senator Olson moved these amendments, and his motion passed unanimously.

Senator Anderson asked about access to records of non-custodial parents, and said that it could cause problems. Senator Mazurek said that while the parent may not have custody of the child, he still has parental rights.

Senator Mazurek moved that the bill BE CONCURRED IN AS AMENDED, and his motion carried over the opposition of Senators Crippen and Tveit.



Mike Anderson
Chairman, Judiciary Committee

ROLL CALL

JUDICIARY COMMITTEE

47th LEGISLATIVE SESSION - - 1981

Date *March 25, 1981*

NAME	PRESENT	ABSENT	EXCUSED
Anderson, Mike, Chr. (R)	✓		
O'Hara, Jesse A. (R)	✓		
Olson, S. A. (R)	✓		
Brown, Bob (R)	✓		
Crippen, Bruce D. (R)	✓		
Tveit, Larry J. (R)	✓		
Brown, Steve (D)	✓		
Berg, Harry K. (D)	✓		
Mazurek, Joseph P. (D)	✓		
Halligan, Michael (D)	✓		

Each day attach to minutes.

STANDING COMMITTEE REPORT

March 25, 1961

MR. PRESIDENT:

We, your committee on JUDICIARY

having had under consideration HOUSE Bill No. 703

DUSSAULT (MAZUREK)

Respectfully report as follows: That HOUSE Bill No. 703,

third reading copy, be amended as follows:

1. Title, lines 4 through 5.
Following: the second "ACT" on line 4
Insert: "PERTAINING"
Following: "TO" on line 4
Strike: line 4 through "FOR" on line 5

2. Title, line 6.
Following: ";"
Strike: line 6
Insert: "CONSIDERING"

3. Page 1, line 20.
Following: "custody"
Strike: "to any interested party"

DO PASS

March 25, 1981

4. Page 1, line 23.

Following: "establish"

Strike: "preferences and"

5. Page 2, lines 2 through 3.

Following: "awarded" on line 2

Strike: "in"

Insert: "to"

Following: "following" on line 2

Strike: line 2 through "preference" on line 3

6. Page 2, line 17.

Following: "3."

Strike: "Presumption in favor of joint"

Insert: "Joint"

7. Page 2, lines 20 through 21.

Following: "custody," on line 20

Strike: line 20 through "that" on line 21

Insert: "the court shall consider whether or not"

etc.
And, as so amended,
BE CONCURRED IN

March 31, 1981

SENATE COMMITTEE OF THE WHOLE

Proposed amendment to House Bill 703, third reading copy, as follows:

1. Page 3, lines 7 through 15.
Following: "custody." on line 7.
Strike: the remainder of these lines.
Renumber: subsequent subsections.

HOUSE BILL NO. 703

INTRODUCED BY DUSSAULT, MAZUREK

A BILL FOR AN ACT ENTITLED: "AN ACT PERTAINING TO ESTABLISH
A-PREFERENCE-FOR JOINT CUSTODY AWARDS UPON DISSOLUTION OF
MARRIAGE; ~~ESTABLISHING--AN-ORDER-OF-PREFERENCE-ACCORDING-TO~~
CONSIDERING THE BEST INTERESTS OF THE CHILD; AND ALLOWING
THE NONCUSTODIAL PARENT ACCESS TO RECORDS."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Declaration of legislative intent -- joint
custody. (1) The legislature of the state of Montana finds
and declares that it is the public policy of this state to
assure minor children frequent and continuing contact with
both parents after the parents have separated or dissolved
their marriage and to encourage parents to share the rights
and responsibilities of child rearing in order to effect
this policy. The legislature believes that the district
courts of the state of Montana have the authority to award
joint custody ~~to any interested party~~ if the court finds
joint custody in the best interests of the children in the
case then before the court. The intent of [this act] is to
establish ~~preferences and~~ certain guidelines for resolution
of custody disputes.

Section 2. Award of joint or separate custody. In

custody disputes involving both parents of a minor child,
custody shall be awarded ~~in~~ to the following order--of
preference according to the best interests of the child as
set out in 40-4-212:

(1) to both parents jointly pursuant to [section 3].
The court, in its discretion, may require the submission to
the court of a plan for the implementation of the joint
custody order; or

(2) to either parent. In making an award to either
parent, the court shall consider, along with the factors set
out in 40-4-212, which parent is more likely to allow the
child frequent and continuing contact with the noncustodial
parent and may not prefer a parent as custodian because of
the parent's sex. The court, in its discretion, may require
the submission to the court of a plan for the implementation
of the custody order.

Section 3. ~~Presumption in favor of joint~~ JOINT custody
-- modification -- consultation with professionals. (1) Upon
application of either parent or both parents for joint
custody, ~~there is a presumption affecting the burden of~~
~~proof that~~ THE COURT SHALL CONSIDER WHETHER OR NOT joint
custody is in the best interests of a minor child. If the
court declines to enter an order awarding joint custody the
court shall state in its decision the reasons for denial of
an award of joint custody.

1 (2) For the purposes of this section, "joint custody"
 2 means an order awarding custody of the minor child to both
 3 parents and providing that the residency of the child shall
 4 be shared by the parents in such a way as to assure the
 5 child frequent and continuing (but not necessarily equal)
 6 contact with both parents.

7 (3) Any order for joint custody may be modified
 8 pursuant to 40-4-219 to terminate the joint custody. if
 9 ~~modification--is--granted--and--either--parent--opposes--the~~
 10 ~~modification, the court shall--state--in--its--decision--the~~
 11 ~~reasons--for--modification.~~

12 ~~{4}--Any order for the custody of a minor child entered~~
 13 ~~by a court in this state or any other state may, subject to~~
 14 ~~appropriate jurisdictional requirements, be modified at any~~
 15 ~~time to an order of joint custody in accordance with the~~
 16 ~~provisions of 40-4-212 and [this act].~~

17 {5}(4) The court may WITH THE CONSENT OF BOTH PARTIES,
 18 at any time, direct the parties to consult with appropriate
 19 professionals for the purpose of assisting the parties to
 20 formulate a plan for implementation of the custody order or
 21 to resolve any controversy that has arisen in the
 22 implementation of a plan for custody.

23 Section 4. Access to records by noncustodial parent.
 24 Notwithstanding any other provision of law, access to
 25 records and information pertaining to a minor child,

1 including but not limited to medical, dental, law
 2 enforcement, and school records, may not be denied to a
 3 parent because such parent is not the child's custodial
 4 parent.

5 Section 5. Codification instruction. Sections 1
 6 through 4 are intended to be codified as an integral part of
 7 Title 40, chapter 4, part 2.

-End-